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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re ROLANDO GAOIRAN,  
  
on Habeas Corpus.

H035487  
(Santa Clara County  
Super. Ct. No. 105491)

**INTRODUCTION**

On December 19, 2008, the superior court granted petitioner Rolando Gaoiran's petition for writ of habeas corpus and ordered the Board of Parole Hearings (the Board) to conduct a further parole suitability hearing in his case. The Board appealed and this court temporarily stayed the superior court's order. Subsequently, the Board held Gaoiran's 10th parole suitability hearing on March 3, 2009, and granted Gaoiran parole. On March 12, 2009, this court granted the Board's petition for writ of supersedeas as to the December 19, 2008 order, and stayed the order until completion of appellate proceedings. When the Board's March 3, 2009 decision became final as to the Board, the Board moved to dismiss the appeal from the December 19, 2008 order and the appeal was dismissed on July 7, 2009.

On July 31, 2009, Governor Schwarzenegger reversed the Board's March 3, 2009 decision granting Gaoiran parole. When Gaoiran sought a further parole hearing pursuant to the superior court's December 19, 2008 order, the Board informed him that his March 3, 2009 hearing had fulfilled the conditions laid out in the court's order. On

September 15, 2009, Gaoiran filed a petition for writ of habeas corpus challenging Governor Schwarzenegger's July 31, 2009 decision. On September 18, 2009, Gaoiran filed a motion in the superior court seeking an order enforcing that court's grant of his 2008 habeas corpus petition and directing the Board to conduct a further parole suitability hearing. The court issued an order to show cause on November 16, 2009, as to the petition for writ of habeas corpus. The court separately issued an order requesting that the Board respond to Gaoiran's motion with points and authorities to support its position that the March 3, 2009 hearing satisfied the demands of the court's December 19, 2008 order.

On December 8, 2009, the Board filed its response to Gaoiran's motion and, on December 21, 2009, the warden of the prison where Gaoiran was incarcerated (the Warden) filed a return to the order to show cause. The superior court granted Gaoiran's petition for writ of habeas corpus on April 9, 2010, concluding that "the Governor's decision is not supported by some reliable evidence and the Governor has failed to articulate a nexus between [Gaoiran's] commitment offense and his conclusion that [Gaoiran] remains a danger to society." In a separate order filed April 15, 2010, the court granted Gaoiran's motion to enforce the court's December 2008 order granting his petition for writ of habeas corpus.

The Warden appeals from the superior court's April 9, 2010 order (Pen. Code, §§ 1477, 1506), contending that some evidence supports Governor Schwarzenegger's decision to deny Gaoiran parole and, if this court comes to a contrary finding, the proper remedy is to remand the case back to the Governor.<sup>1</sup> For reasons we explain below, we will dismiss the appeal as moot.

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<sup>1</sup> The court's April 15, 2010 order is not a subject of this appeal.

## **BACKGROUND**

### ***Gaoiran's Social History***

Gaoiran was born and grew up in the Philippines. His native tongue is Ilocano. His sister-in-law took him in when he was five, and his father died when he was 14. He went as far as the 12th grade in school in the Philippines but passed only two of the five tests in this country required to get his GED. He was 21 when his sister-in-law, who was then in the U.S. Navy, brought him, his mother, and another brother to this country. He first worked on a farm, but he also did production work for a plastics company and worked at a convalescent hospital as a cook and dishwasher. His last job was working with floppy discs for Quantum Corporation. He has trained in martial arts and has achieved his brown belt. He had no criminal record prior to being arrested, but not convicted, in 1985 for driving under the influence. He married and had a daughter, but he is currently divorced and his last contact with his daughter was in 1987 or 1988. His mother has passed away, but he is still in contact with his sister-in-law, a niece, and a nephew.

### ***The Commitment Offense***

In 1985, Gaoiran was 31 years old. He had known Jose Torres for over two years, and the two were friends. They also worked together. Torres was a heavy drinker and he sometimes drank while at work. Torres did not like it when Gaoiran told Torres that he should not be drinking at work. Torres threatened Gaoiran two or three times. At a Christmas party on December 24, 1985, which both their families attended, Torres and Gaoiran argued. Both of them had both been drinking. Torres approached Gaoiran with a knife. Gaoiran ran. He grabbed a loaded handgun from his car and returned to his family at the party. Sometime later, when Torres grabbed Gaoiran by the collar, they wrestled and Torres pulled away. Gaoiran then pulled the gun out from under his clothing and shot Torres three times. After Torres fell to the ground, Gaoiran shot him again.

Gaoiran's handgun was taken from him by other people at the party. He left but immediately turned himself in to the police. A blood test revealed that he had a blood alcohol level of .09. Torres's blood alcohol level was .36. Gaoiran was convicted by negotiated guilty plea of second degree murder and was sentenced to prison in April 1986 for 15 years to life.

### ***His Conduct While Incarcerated***

Gaoiran's last disciplinary citation was in December 1997. He remained discipline-free, he achieved "positive chronos," and he continued to participate in self-help programs after his last parole hearing as recommended by the Board at that hearing. He has attained certification as a welder, an upholsterer, and an auto mechanic, and he has skills as a machinist. He has been working in "PIA" and chair upholstery, and has above average ratings there. He has been attending AA meetings for about 20 years, and he has also been involved with NA, Toys for Tots, and the Straight Life program. He has also donated money for a walkathon. He completed the Alternatives to Violence program, an anger management program, the Fathers program, and a spiritual class. He has also participated in the Impact program, the Family Literacy program, and a bible study class.

### ***The Psychological Evaluation***

In May 2007, Richard Starrett, Ph.D., conducted a psychological evaluation of Gaoiran. Dr. Starrett noted that, even with an interpreter, Gaoiran "still did not appear to understand or comprehend the questions. His responses did not match with the question even though the question was rephrased and asked a number of times."<sup>2</sup> Dr. Starrett noted that Gaoiran's version of the circumstances of the commitment offense remained the same as stated in the 1986 probation officer's report, and that "Gaoiran continues to

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<sup>2</sup> Dr. Starrett's evaluation states that an Ilocano interpreter was used. Gaoiran maintains that the interpreter spoke Tagalog, not Ilocano.

state that he feels deep remorse for the victim and his family.” Gaoiran told Dr. Starrett that “[h]e was not in his right senses and he got into an argument and he was angry.” Dr. Starrett noted that Gaoiran “openly acknowledges his use of alcohol as a major factor in the committing offense,” but that Gaoiran has been clean and sober for 21 years, “he knows the steps and understands the life-long need for treatment.” Dr. Starrett concluded that Gaoiran is in the “low range” for psychopathy, risk of future violence, and recidivism, and that Gaoiran has an overall “low range of risk of any type of new crime.” “The inmate does not appear to have a negative attitude, no active mental health symptoms, and no impulsivity. The inmate’s response to treatment has been satisfactory.”

### ***The March 2009 Parole Hearing***

At his 10th subsequent parole hearing in March 2009, Gaoiran, who was then 55 years old, told the Board that he shot Torres the first three times because he panicked, but he shot Torres the fourth time after Torres fell to the ground because he was angry. He admitted that he intended to kill Torres. He did not realize how drunk Torres was and said that if he had realized it, “things would have been different.” In a written statement that Gaoiran read to the Board, he acknowledged that he “committed murder,” and that “[i]t was not an accident, and it was not self defense because I could have walked away before.”

Upon his release, Gaoiran plans to live with either his sister-in-law in San Jose or his nephew. His sister-in-law has agreed to support him until he gains steady employment. His nephew has offered him employment refurbishing industrial ovens. He no longer has a desire to drink and he will continue to participate in AA.

Gaoiran’s central file contains numerous letters from the San Jose Police Department opposing his parole. A deputy district attorney who attended the March 2009 parole hearing via video conference requested that Gaoiran be denied parole.

The Board determined that Gaoiran was suitable for parole and would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison. In granting Gaoiran parole, the Board (1) considered the nature and gravity of the commitment offense, finding it “particularly troubling and reckless”; (2) considered and weighed the opposition to parole from the district attorney; (3) considered the 2007 psychological report<sup>3</sup> which assessed Gaoiran as being at low risk for reoffending; (4) found that Gaoiran had come to terms with the causative factors underlying his offense to the extent that he could actually analyze them; (5) was “satisfied” that Gaoiran was not a current danger to society, as he did not have a prior history of violence or drug use and had no prior convictions; (6) found that Gaoiran had a reasonably stable history of relationships with others; (7) found that Gaoiran had “really take[n] the programming to heart” and had done everything that could be asked of him; (8) found that Gaoiran had realistic parole plans; and (9) found that Gaoiran was not likely to have a gun again. The Board concluded that “the positive aspects of [Gaoiran’s] case do heavily outweigh the other considerations that have been discussed” during the hearing. The Board set his term at 156 months (13 years) and ordered as special terms of parole that he submit to random drug testing, that he not possess or consume alcoholic beverages, that he attend the parole outpatient clinic for an evaluation and any needed treatment, and that he not have any contact with Torres’s family.

### ***The Governor’s Decision***

In his decision dated July 31, 2009, Governor Schwarzenegger reversed the Board’s decision to grant Gaoiran parole. The Governor concluded: “The gravity of the crime supports my decision, but I am particularly concerned by Gaoiran’s lack of insight

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<sup>3</sup> The Board had requested a new psychological report but was informed by the head of the Forensic Assessment Division that it would not be done. After discussing the matter, the Board determined that a new psychological report was not necessary.

into the circumstances of the life crime and his failure to accept full responsibility for his actions. This information indicates to me that Gaoiran would present a current, unreasonable risk of danger to society if released at this time. The Santa Clara County District Attorney's Office agrees, registering its opposition to parole with the 2009 Board. [¶] At age 55 now, after being incarcerated for more than 23 years, Gaoiran made some creditable gains in prison. But given the current record before me, and after carefully considering the very same factors the Board must consider, I believe his release from prison would pose an unreasonable risk of danger to society at this time."

Governor Schwarzenegger noted that Gaoiran had no previous convictions, that he had completed training in several vocations, that he had held institutional jobs, that he had availed himself of self-help and therapy, that he had maintained supportive relationships with his family, and that he had an employment offer. Nevertheless, Governor Schwarzenegger found that "the second-degree murder for which Gaoiran was convicted was especially atrocious. . . ." " 'Torres was particularly vulnerable, because he was unarmed attending this party with friends, and he was under the influence.' " "I am also concerned that, although Gaoiran says he accepts responsibility for his actions and is remorseful, his articulation of responsibility and his version of events surrounding the life offense have varied over the years." "According to his 2007 mental-health evaluation, Gaoiran 'was not in his right senses and he got into an argument and he was angry.' " "The 2009 Board asked Gaoiran why he armed himself and he said, 'I don't know why. I just was taking my gun there. I was thinking to myself that, you know, just in case.' " "The 2009 Board discussed Gaoiran's level of insight, saying, 'When we looked at the answers that you gave to some of the questions, and you were unable to express detailed answers to some of the questions. You were asked, why did you get a gun? You were thoughtful about that, but you said in the end, I don't know. You were asked, why bring the gun back? And you said, also, that you didn't know. You were also asked, why didn't you use your martial arts if you wanted to deal in a physical way with

this man? Why didn't you use your martial arts training? And you said, I don't know. But you didn't say that off the cuff or out of hand. You said it with deliberate – with deliberation and thought.' The 2009 Board nevertheless found his level of insight adequate. I disagree." "Gaoiran's version of the offense is wholly inconsistent with facts contained in the record, suggesting that he still lacks insight into the circumstances of the offense." "Gaoiran . . . told his 2002 mental-health evaluator that he was knocked to the ground, he was kicked and choked, and then he fired his weapon. Though he chose not to discuss the motivation behind the crime with his 2005 mental-health evaluator, Gaoiran claimed he was acting in 'self-defense.' " "The fact that Gaoiran still attempts to minimize his actions in the life offense and that he recently attributed his actions to 'self-defense' indicates that he has not yet accepted responsibility for his prior crime. This is concerning because Gaoiran cannot ensure that he will not commit similar crimes in the future if he does not completely understand and accept full responsibility for his offense."

### ***The Superior Court Proceedings***

On September 15, 2009, Gaoiran filed a petition for writ of habeas corpus in the superior court. He contended that Governor Schwarzenegger's decision reversing the Board's finding of parole suitability was not supported by any evidence of current dangerousness. The court issued an order to show cause on November 16, 2009, stating: "On July 31, 2009, Governor Schwarzenegger reversed the Board's decision, citing the egregiousness of [Gaoiran's] commitment offense and [Gaoiran's] lack of insight as reasons for his decision. As enunciated in the California Supreme Court's decision of *In re Lawrence* (2008) 44 Cal.4th 1181 [(*Lawrence*)], in order to rely upon immutable factors, such as the egregiousness of the commitment offense, the reviewing body must state a nexus between those factors and the present level of danger posed by the inmate's release. On its face, the Governor's decision does not appear to state such a nexus. [¶] The Governor next relies upon what he views as [Gaoiran's] lack of insight into the circumstances of his offense. As evidence of this, the Governor cites portions of the

Board's 2009 decision and mental health examinations from 2002 and 2007. However, the Governor appears to discount or wholly disregard the context of the Board's statements and the conclusions of the most recent psychological report. For those reasons, Respondent is ordered to show cause why the matter should not be remanded to the Governor for further consideration."

Meanwhile, on September 18, 2009, Gaoiran filed a motion in the superior court seeking an order enforcing that court's grant of his 2008 habeas corpus petition and directing the Board to conduct a further parole suitability hearing. On November 16, 2009, the court issued an order requesting that the Board respond to Gaoiran's motion with points and authorities to support its position that the March 3, 2009 hearing satisfied the demands of the court's December 19, 2008 order.

On December 8, 2009, the Board filed its response to Gaoiran's motion, contending that Gaoiran received the exact relief requested in his original habeas corpus petition and ordered by the court: a parole consideration hearing comporting with due process. The Board argued that "[t]he fact that the Governor reversed the Board's parole grant is irrelevant to the question of whether the Board abided by th[e] Court's order. As the Board fulfilled its obligation to provide Gaoiran with the remedy ordered by th[e] Court, the motion for a new parole consideration hearing should be denied."

On December 21, 2009, the Warden filed a return to the order to show cause, denying that Gaoiran was entitled to habeas corpus relief. The Warden alleged that "the record contains some evidence that Gaoiran would pose a threat to public safety if released on parole" and that "the Governor stated a nexus between the factors invoked as evidence of parole unsuitability and Gaoiran's risk of danger to the public." The Warden denied that "the Governor ignored evidence tending to show parole suitability or otherwise failed to consider the entirety of the record before him."

Gaoiran filed his traverse (denial) on March 24, 2010, contending that the Governor's decision did not contain an explicit articulation of a rational nexus between

the facts and current dangerousness. “[T]he Governor did exactly what the California Supreme Court prohibited which is make an unsuitability finding based on allegations that cannot be supported by fact and then failed to relate the allegations to the ultimate question of whether or not the inmate poses a current threat of danger if released.”

On April 9, 2010, the superior court filed its order granting Gaoiran’s petition for writ of habeas corpus, vacating Governor Schwarzenegger’s decision, reinstating the Board’s decision, and directing the Warden to release Gaoiran within seven days. The order states in pertinent part: “In July [2009], Governor Schwarzenegger reversed the grant of parole. As support for his decision, the Governor cites the ‘especially atrocious’ nature of [Gaoiran’s] 1985 commitment offense and the fact that [his] retelling of the events that led to the crime has varied over the twenty-three years of his incarceration. [¶] The Governor highlights a number of [Gaoiran’s] prior statements over the last ten years that are inconsistent with the version of events in the police and probation reports. The Governor was particularly troubled by [Gaoiran’s] statements at the March 2009 hearing that, in essence, [Gaoiran] did not know why he had his gun at the time of the shooting and did not know why he shot the victim. . . . However, the Governor ignores [Gaoiran’s] difficulties with the English language, the fact that he made an untimely request for an interpreter at the beginning of the hearing and read a letter he had written to the Board, in which he states that ‘my English is still not good enough to explain myself to the Board in a short time when I have to talk.’ . . . [¶] The Governor also cites Dr. Starrett’s 2007 mental health evaluation in which he states that there has been a conflict between [Gaoiran’s] version of events over time. . . . However, Dr. Starrett also notes that [Gaoiran] should be encouraged to [speak] to a priest, counselor or health worker in his own language to better communicate his version of events. . . . [¶] Finally, the Governor makes no reference to the content of [Gaoiran’s] letter in which he emphasizes that the commitment offense ‘was not an accident, it was not self defense because [he] could have walked away before.’ . . . [Gaoiran] goes on to state that he

‘know[s] now how horrific . . . [his] actions were’ and that he would walk away if he were ‘ever in a situation where anger or fear are coming up.’ . . . [¶] While [*In re*] *Shaputis* [(2008) 44 Cal.4th 1241 (*Shaputis*)] provides that an inmate’s lack of insight into the causes of the commitment offense is enough to deny parole when related to the inmate’s failure to explore his history of violence, substance abuse or anger problems, the same cannot be said for a situation where, as here, [Gaoiran’s] purported lack of insight is, in fact, nothing more than an inability to articulate his insight when questioned orally. . . . When [Gaoiran] is given the opportunity to present his level of insight in writing, as he did and was ignored by the Governor, he presents a dramatically different picture from that relied upon by the Governor. Thus, the Governor’s decision is not supported by some reliable evidence and the Governor has failed to articulate a nexus between [Gaoiran’s] commitment offense and his conclusion that [Gaoiran] remains a danger to society.”

On April 15, 2010, the court filed its order granting Gaoiran’s motion to enforce its December 2008 order. The court concluded: “[A]t the time that the Board held the subsequent parole consideration hearing on March 3, 2009, this Court’s order had no force as the Sixth District Court of Appeal had stayed the order pending review at the Attorney General’s request. [Gaoiran] is entitled to a fair hearing, in compliance with due process, every time he goes before the Board. In [Gaoiran’s] case, he did not receive a fair hearing in 2008 and a regularly scheduled subsequent parole hearing, held while the Board’s representatives challenged the validity of this Court’s conclusion, did not serve to remedy the Board’s failure. As such, the Board is hereby ordered to conduct a further parole consideration hearing in compliance with this Court’s December 2008 order within 30 days of the date of this order. That hearing may be postponed, at [Gaoiran’s] request, pending finality of this Court’s most recent order, which called for [his] immediate release.”

On April 19, 2010, the Warden filed a notice of appeal from the superior court's April 9, 2010 order granting Gaoiran's petition for writ of habeas corpus. On June 15, 2010, we granted the Warden's petition for writ of supersedeas and stayed enforcement of the superior court's order until final determination of the appeal.

### **DISCUSSION**

In this court, the Warden contends that, because some evidence supports Governor Schwarzenegger's decision to deny Gaoiran parole, the superior court's order should be reversed. The Warden argues that "[t]he superior court did not conclude that the facts relied upon by the Governor to deny Gaoiran parole were unsupported by the record. Rather, the superior court determined that one piece of evidence—a letter Gaoiran read during his parole consideration hearing—was more determinative of his degree of insight than the evidence cited by the Governor. . . . However, the superior court's belief that the Governor should have placed more weight on Gaoiran's written letter than his verbal statements does not provide a proper basis for habeas relief."

Gaoiran contends that the superior court properly found that Governor Schwarzenegger's reversal of his grant of parole was not supported by some evidence. He argues that "[t]here was no evidence that [he] lacked remorse, acceptance of responsibility, or appreciation of the magnitude of his offense such that the offense remained probative of his dangerousness a quarter-century later, or otherwise showed he would pose an unreasonable risk of release upon parole."

The court held oral argument in this matter on January 25, 2011, and submitted the matter on that date. On March 25, 2011, the Attorney General, counsel for the Warden, informed the court that Gaoiran's release on parole was "imminent." The Warden subsequently filed a motion to voluntarily dismiss the appeal. In the motion, the Warden states that the Board held another parole consideration hearing for Gaoiran and again granted Gaoiran parole, and that on March 23, 2011, the Warden received notice that Governor Brown would take no further action. Gaoiran was released from prison on

March 29, 2011, with the following special conditions of parole: he must report to the Parole Outpatient Clinic for evaluation; he must not possess or consume alcoholic beverages; he must submit to alcohol testing; he must participate in a substance abuse relapse prevention program; and he must have no contact or communication with Jose Torres's family.

As Gaoiran's release on parole renders this appeal moot, and he has not opposed the Warden's motion to dismiss the appeal, we will dismiss the appeal as moot.

**DISPOSITION**

The appeal is dismissed as moot.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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DUFFY, J.